

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY CAD

Respondent's four (4) year participation in the MAP contract began on August 23, 2005, when he signed the MAP contract.

COUNT ONE (File No. 07-0080)

1. The MAP contract specified that Respondent was to completely abstain from using alcohol, other drugs, or any other mood-altering chemicals, for four years.
2. On or about December 15, 2006, the MAP Medical Director, Dr Michael Sucher, notified MAP that Respondent failed a biological fluid test.
3. Respondent admitted to his MAP Monitor that he had used alcohol on two separate occasions. Respondent's Monitor reported the incident in his December report to MAP
4. Respondent admitted the alcohol use during a follow-up meeting with the MAP Director on January 5, 2007
5. By letter dated January 24, 2007, bar counsel requested that Respondent respond to information provided by MAP, specifically Respondent's reported drinking
6. By letter dated January 27, 2007, Respondent informed bar counsel that he did not dispute information contained in the MAP report.
7. If this matter were to proceed to hearing, Respondent would not contest any of the allegations of the Complaint.

During the hearing on the agreement, Respondent admitted that he drank a shot of tequila given to him by a partner in the law firm where he worked during a Christmas party, and the next day drank 2 to 3 beers at a football game

CONCLUSIONS OF LAW

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 53(g), Ariz R Sup Ct

ABA STANDARDS

ABA Standard 3.0 provides that four criteria should be considered (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct, and (4) existence of aggravating or mitigating factors

There are no *ABA Standards* to cover this particular situation since Respondent is charged with violating the terms of his conditional admission to the bar. However, Respondent's conduct is most analogous to a violation of a duty owed to the profession, which implicates *Standard 7.0*

Standard 7.4

Reprimand (censure in Arizona) is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system

Based upon the admissions in this matter, the presumptive sanction is a censure

A. The duty violated, the Lawyer's mental State, and the Actual or Potential Injury

Respondent negligently violated his duty to the profession. There was potential injury to the profession because of Respondent's conditional admission status

B. Aggravating and Mitigating Circumstances

Aggravating Factors

The parties did not submit any, and the Hearing Officer could not find any aggravating factors

Mitigating Factors

Standard 9 32(a) Absence of prior disciplinary record,

Standard 9 32(b) Absence of dishonest or selfish motive,

Standard 9 32(d) Timely good faith effort to rectify consequences of misconduct: Respondent enrolled in and successfully completed a relapse prevention program and is attending Alcoholics Anonymous meetings. There was no harm to clients. Respondent's mentor has indicated that Respondent has been completely compliant with his conditional admission agreement since the two incidents occurred approximately 8 months ago.

Standard 9 32(e) Cooperative attitude towards the proceedings: After his fluid testing came up positive for alcohol consumption, Respondent immediately contacted his MAP monitor, went to a relapse program, and has been cooperative throughout these disciplinary proceedings.

Standard 9 32(l) Remorse: Respondent deeply regrets his relapse. He has expressed his remorse to his mentor, and vowed not to repeat this behavior. Attached as Exhibit A is a letter from Respondent's mentor.

This Hearing Officer had the opportunity to witness Respondent's remorse and commitment not to relapse, and believes he is both sincere and committed to taking the steps in his personal and professional life to assure that this does not happen again.

The parties submit, and this Hearing Officer concurs, that the presumptive sanction of public censure plus probation is appropriate in this case.

PROPORTIONALITY REVIEW

The Supreme Court has held in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993)

There are no cases directly on point. The following cases involve violation of Rule 53(g), however, the underlying conduct is vastly different in each case, and the only commonality being that all respondents were conditional admittees.

In *In re Rolph*, SB-06-0011-D (2006), Rolph was a conditional admittee who failed to comply with the probation requirements imposed as a term of his admittance. He also failed to cooperate with the State Bar's investigation in two disciplinary matters and failed to appear at a deposition for which a subpoena had been issued compelling his attendance. Four aggravating factors were found: prior disciplinary offenses, a pattern of misconduct, multiple offenses and bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency. Three factors were found in mitigation: absence of a dishonest or selfish motive, inexperience in the practice of law, and remorse. Rolph's mental state was knowing and there was actual harm as a result of the misconduct. Rolph was suspended for 90 days, with probation for two years upon reinstatement to consist of participation in MAP and LOMAP and a practice monitor. Rolph violated ERs 1.3, 1.4, 3.4(c), 8.1(b) and 8.4(d), and Rule 53(f), Ariz. R. S. Ct.

In *In re Pohto*, SB-03-0145-D (2004), Mr. Pohto was conditionally admitted to the State Bar of Arizona subject to the terms of a therapeutic contract for substance abuse.

and financial irresponsibility Mr Pohto failed to comply with the terms of his conditional admission Respondent was required to abstain from using alcohol, which he failed to do On November 10, 2000, Mr Pohto had a positive reading for alcohol on a random biological fluids screening On June 30, 2001, Mr Pohto was charged with driving under the influence Mr Pohto violated Rule 51(l), Ariz R S Ct No aggravating factors were found Three mitigating factors were found absence of a prior disciplinary record, absence of dishonest or selfish motive and delay in the disciplinary proceedings Mr Pohto was suspended for six months and one day

In *In re Hilzendeger*, State Bar file number 06-0883 (2006), Hilzendeger was conditionally admitted to the State Bar of Arizona subject to the terms of a therapeutic contract for substance abuse. Without consulting anyone at the State Bar, Respondent moved to San Francisco There were no provisions in the contract that required him to consult with anyone at the State Bar about moving outside of Arizona. The State Bar was notified by the office of MAP Medical Director, Dr Michael Sucher ("Dr Sucher"), that Hilzendeger failed to appear for a random biological fluid testing The State Bar opened a screening file Hilzendeger retained an attorney who assured the State Bar that Hilzendeger had made arrangements for biological fluid testing and had tested once already, that he had contacted his monitor, that he had secured counseling and had scheduled regular sessions Shortly thereafter, Dr Sucher's office notified the State Bar that Hilzendeger again failed to appear for a random biological fluid test Respondent's monitor, Austin Potenza, notified the State Bar that Respondent was not in compliance with the MAP contract with regard to contacting Mr Potenza Respondent was taken off conditional admission status and placed on probation with terms that clearly delineated

Hilzendeger's responsibility to comply with the contract. The parties agreed that Hilzendeger's conduct was negligent, there was no actual harm, and there are no aggravating or mitigating factors.

The conduct in the instant case is not as egregious as the conduct in the Pohto or Rolph matters, as there was actual harm in Rolph and Pohto engaged in a criminal act. However, the conduct in the instant case is more egregious than Hilzendeger's conduct since Hilzendeger simply neglected to comply with the contract due to his move to another state, and there was no proof that Hilzendeger had actually failed any random biological fluid tests.

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

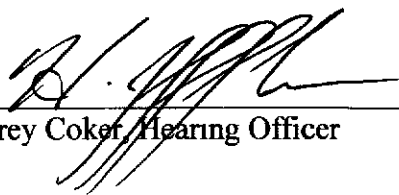
In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors, and a proportionality analysis, this Hearing Officer recommends the following

1. Respondent shall receive a public censure for violating Rule 53(g), Ariz R S Ct , and probation until July 19, 2009
- 2 Respondent is currently subject to a MAP contract that will expire on July 19, 2009 The term of Respondent's probation in this matter is to continue with that contract until July 19, 2009 The parties have agreed, however, that certain modification will be made to the current MAP contract as needed.
- 3 Once the Judgment and Order has been issued, Respondent will no longer be on conditional admission status
4. Respondent shall pay all costs and expenses incurred by the State Bar in this disciplinary proceeding, as provided the State Bar's statement of costs and expenses, attached hereto as Exhibit A and incorporated herein

In the event Respondent fails to comply with any of the foregoing terms, and the State Bar receives information about his failure, bar counsel will file a Notice of Non-Compliance with the disciplinary clerk A hearing officer will conduct a hearing at the earliest practical date, but in no event later than thirty days following receipt of the notice, and will determine whether the terms have been breached and, if so, will recommend appropriate action in response to the breach The State Bar shall have the burden of proving non-compliance by clear and convincing evidence

DATED this 7 day of Sept, 2007



H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 7th day of September, 2007

Copy of the foregoing mailed
this 17th day of September, 2007, to.

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by *C. L. B.*